**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

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| **PATRICIA LOWMAN,** | : | |
| | : | |
| **Claimant-Below,** | : | **C.A. No: 05A-06-004 RBY** |
| **Appellant,** | : | |
| | : | |
| **v.** | : | |
| | : | |
| **WAL-MART, INC.,** | : | |
| | : | |
| **Employer-Below,** | : | |
| **Appellee.** | : | |

Submitted: January 18, 2006
Decided: March 28, 2006

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, Attorney for Appeallant.

Michael R. Ippoliti, Esq., Wilmington, Delaware, Attorney for Appellee.

**OPINION**

***Upon Consideration of Appellant's Appeal from Decision of the Industrial Accident Board***

**AFFIRMED**

Young, Judge

## OPINION

Appellant, Patricia Lowman, ("Lowman") appeals the June 6, 2005 decision of the Industrial Accident Board ("Board"), which granted in part, and denied in part, her Petition to Determine Compensation. Lowman's appeal is limited to the portion of the Board's decision that denied payment for the bills of Rachael Smith, D.O. and Rehabilitation Associates, as not causally related to the September 24, 2004 work accident. In addition, Lowman appeals the Board's denial of her request for mileage reimbursement. Lowman argues that the Board's decision is contrary to law, contrary to the evidence presented at the hearing, and not supported by substantial evidence. For the following reasons, Lowman's Appeal is **DENIED**.

## FACTS

On September 24, 2004, Lowman was working as a "door runner" on the loading dock at the Wal-Mart Distribution Center.[1] She was injured when a forklift clamp struck her, and caused her to fall backwards onto the concrete floor.[2] Lowman testified that the impact of the clamp caused her to twist and fall on her back, injuring her right side, neck, low back, and buttocks.[3] The accident occurred on a Friday. Lowman sought treatment for her injuries on the following Monday at Health Works.[4]

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1 *Lowman v. Wal-Mart, Inc.*, IAB Hearing No. 1257841 (June 6, 2005).

2 Tr. Lowman, IAB Hearing No. 1257841, at 12:1-5; Tr. Smith at 48:15-17.

3 Tr. Lowman at 13:5-20.

4 *Id.* at 14:1-4.

Lowman followed-up with her family doctor, Dr. Al-Junaiti, who prescribed physical therapy and medication.[5]

When Lowman's symptoms persisted, Dr. Al-Junaiti referred her to Rachael Smith, D.O., a physical medicine and rehabilitation specialist.[6] Dr. Smith initially evaluated Lowman on December 29, 2004, and diagnosed her with neck, shoulder, upper and low back sprain and strain, arm pain, and headaches.[7] Dr. Smith prescribed medication, physical therapy, and chiropractic treatment, which was provided by therapists in Dr. Smith's office, Rehabilitation Associates.[8] At her next appointment with Dr. Smith on January 24, 2005, Lowman reported that the therapy and chiropractic treatment were not providing any relief.[9] Dr. Smith discontinued therapy and chiropractic, and advised Lowman to continue performing home exercises.[10] Dr. Smith also continued Lowman's light-duty status, and referred her for x-rays of her thoracic and lumbar spine and an EMG of her right arm.[11]

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5 *Id.* at 14:11-9.

6 *Id.* at 16:1-3.

7 Dep. Smith at 15:13-17.

8 *Id.* at 16:6-15.

9 *Id.* at 18:15-22.

10 *Id.* at 20:5-9.

11 *Id.* at 20:10-13.

At her next office visit with Dr. Smith on April 7, 2005, Lowman complained that her symptoms had not improved.[12] However, Dr. Smith noted that Lowman had not complied with her recommendations, and had not been seen by Dr. Smith for a few months.[13] Lowman had also exhausted her supply of prescription medication, and was relying on over-the-counter medication to treat her pain.[14] Dr. Smith warned Lowman that she would not be able to treat Lowman effectively, because of the gap in treatment and failure to undergo the recommended testing.[15] At her last visit with Dr. Smith on April 25, 2005, Lowman had undergone the diagnostic testing, including an EMG of the right upper extremity and thoracic and lumbar spine x-rays, all of which were within normal limits.[16]

Lowman was examined by neurologist, Bruce Grossinger, M.D., on behalf of the employer, Wal-Mart, Inc., on April 21, 2005. In addition to a physical examination, Dr. Grossinger reviewed Lowman's medical records. Dr. Grossinger opined that Lowman's injuries resolved two weeks after the work accident.[17] Dr. Grossinger's opinion was based on his physical examination and review of the medical records. Dr. Grossinger also concluded that Lowman was exaggerating her

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[12] Tr. Lowman at 33:13-19.

[13] *Id.*

[14] Dep. Smith at 24:3-4.

[15] *Id.* at 25:19-22.

[16] *Id.* at 27-28.

[17] *Lowman v. Wal-Mart, Inc.*, IAB Hearing No. 1257841 (June 6, 2005), at 9.

symptoms.[18] Dr. Grossinger testified that Lowman did not have any organic problem related to the work accident, and did not require any future treatment.[19]

At the Board hearing, Lowman gave conflicting testimony about the effectiveness of physical therapy prescribed by Dr. Smith. Initially, Lowman testified that Dr. Smith's treatment was more extensive than the treatment she received in physical therapy, and gave her more relief.[20] However, later in her hearing testimony, Lowman stated that she discontinued the physical therapy and chiropractic treatment prescribed by Dr. Smith, because it was not helping her pain.[21] Lowman testified that her current symptoms included pain in the neck, shoulders, low back, hip, and pain and numbness in her legs.[22] Lowman's injuries, it is stated, affect her daily life, and make difficult performance of household chores.[23] Lowman further stated that Dr. Smith prescribed several medications to treat Lowman's pain, but the only medication that has given her any relief is Topax, which helps her sleep.[24] In addition to taking Topax, Lowman treats her pain by performing home exercises.[25]

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[18] *Id.* at 8.

[19] *Id.* at 10.

[20] Tr. Lowman at 17:8-21.

[21] *Id.* at 39:1-20.

[22] *Id.* at 25:18-21.

[23] *Id.* at 26:6-12.

[24] *Id.* at 32:3-20.

[25] *Id.* at 40:1-5.

**DECISION OF THE INDUSTRIAL ACCIDENT BOARD**

The Board's June 6, 2005 decision denied Lowman's claim for worker's compensation benefits for the treatment she received from Dr. Smith and Rehabilitation Associates. The Board also denied Lowman's claim for mileage reimbursement. Wal-Mart did not dispute that Lowman suffered a work-related injury on September 24, 2004. With the exception of a November 2004 MRI, Wal-Mart paid for Lowman's medical treatment through December 2004. Wal-Mart also paid some of the bills for Dr. Smith's treatment in January 2005. However, Wal-Mart argued, and the Board agreed, that any medical treatment rendered to Lowman after December 2004 was not causally related to the work accident.

In support of its decision, the Board accepted the opinion of Wal-Mart's medical expert, Dr. Grossinger, that Lowman's work-related injuries resolved shortly after the accident. Dr. Grossinger agreed that Dr. Smith's treatment was reasonable and necessary, based on Lowman's subjective complaints, but not causally related to the work accident. In addition to Dr. Grossinger's opinion, the Board also considered the lack of objective findings by any physician other than Dr. Smith; unremarkable diagnostic testing, including x-rays, EMG's, and a cervical MRI; and the lack of any improvement in Lowman's subjective complaints.

Finally, the Board doubted Lowman's credibility. Specifically, the Board noted Lowman's documented exaggeration of her subjective complaints, her failure to undergo prescribed diagnostic testing, missed or cancelled appointments, and gap of treatment without a supply of prescription medication. Although the Board did not

fault Dr. Smith for believing Lowman's subjective complaints, the Board did not find that any of Dr. Smith's treatment was causally related to the work accident.

## STANDARD OF REVIEW

On appeal, this Court reviews a decision of the Industrial Accident Board to determine whether the Board's decision was supported by substantial evidence and free from legal error.[26] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[27] In addition, substantial evidence is "more than a scintilla but less than a preponderance . . . "[28] On appeal, this Court does not have the "authority to weigh evidence, determine the credibility of witnesses or make independent factual findings."[29] If the Board's decision is supported by substantial evidence, this Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."[30] Questions of law are reviewed *de novo*.[31]

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[26] *Methodist Country House v. Wright*, 2005 Del. Super. LEXIS 167, at *5.

[27] *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)(*quoting Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

[28] *Id*. (*quoting Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

[29] *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(*citing Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[30] *Bolden v. Kraft Foods*, 2005 Del. LEXIS 527, at *5 (Del. Supr.)(*citing DiGiacomo v. Bd. of Public Educ.*, 507 A.2d 542, 546 (Del. 1986)).

[31] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)(*citing State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).

## DISCUSSION

The dispute in this matter is whether Wal-Mart should be required to pay for the medical treatment rendered to Lowman by Dr. Smith and Rehabilitation Associates from January to April 2005. Wal-Mart concedes that Lowman suffered a work injury on September 24, 2004, but disputes the treatment Lowman received from Dr. Smith and Rehabilitation Associates. Wal-Mart argues that this treatment is not compensable, because it was not causally related to the work accident. The Board agreed, and, accordingly, denied the portion of Lowman's petition which sought payment for those bills.

Lowman appeals the Board's decision, arguing that there was substantial evidence to support Dr. Smith's treatment as reasonable, necessary, and causally related to the work accident. In support of her argument, Lowman specifically cites the testimony of Dr. Smith as substantial evidence to support a finding that Lowman's treatment was causally related to the accident. In addition, Lowman takes issue with the Board's decision to adopt the opinion of Dr. Grossinger, Wal-Mart's medical expert, over the opinion of Dr. Smith, Lowman's treating physician. Lowman maintains that the Board should have afforded Dr. Smith's testimony substantial weight, and followed her opinion, accordingly.

The Delaware Worker's Compensation Statute provides that, when an employee is disabled, the employer shall furnish reasonable medical treatment to the employee.[32] However, the employer will only be liable for the reasonable cost of that

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[32] 19 Del.C. § 2322.

medical treatment, if the injury is determined to be compensable.[33] The employee bears the burden to prove that her medical expenses "were reasonable, necessary and causally related to the original injury."[34]

When the parties' evidence in support of their positions is based on expert witness testimony, the Board has the discretion to evaluate the conflicting expert opinions as a matter of credibility.[35] The Board may adopt the opinion of one expert, and reject the other.[36] Moreover, the Board is free to accept all, or a portion, of an expert's opinion.[37] The opinion that the Board ultimately adopts will be considered "substantial evidence for purposes of appellate review."[38] Because the claimant's treating physician is more familiar with the claimant's condition, the Board may grant the treating physician's opinion substantial weight.[39] However, the Board is not bound to follow the opinion of the treating physician. Rather the Board may "discount

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[33] §2323.

[34] *George & Lynch v. Donaway*, 2001 WL 487912, at *2 (Del.Super.)(*citing Turnbill v. Perdue Farms,* 1998 WL 281201 ( Del.Super.)).

[35] *Bolden*, 2005 Del. LEXIS 527, at *4(*citing Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992)); *Hart v. Columbia Vending Service*, 1998 WL 281241, at *5 (Del.Super.)(*citing .Medical Center of Delaware v. Quinn,* 1994 WL 380990 (Del. Super.)).

[36] *Id.* at *4 (*citing Reese,* 619 A.2d at 910); *Hart v. Columbia Vending Service*, 1998 WL 281241, at *5 (Del. Super.)(*citing Quinn,* 1994 WL 380990 ).

[37] *Hart*, 1998 WL 281241, at *5 (holding that adopting an expert's opinion is not an "all or nothing" rule.).

[38] *Bolden*, 2005 Del. LEXIS 527, at *4.

[39] *Bradley v. State*, 2003 Del. LEXIS 331, at *16 (Del. Super.) (*citing Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1065 (Del. 1999)).

the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing."[40]

In this case, Lowman's argument that the Board's decision is not supported by substantial evidence is not persuasive. The Board was free to weigh the testimony of both experts, and determine which opinion was more credible. Dr. Smith's position as Lowman's treating physician may give her opinion initial credence, but it does not follow that her opinion is dispositive of the issue of whether Lowman's treatment is compensable. Lowman makes the point that Dr. Smith's opinion should outweigh Dr. Grossinger's, because Dr. Smith evaluated Lowman on a sequential basis, and examined Lowman's condition and symptoms repeatedly. This argument, if it were to be appropriate in some cases, is not so here, as Dr. Smith only examined Lowman on four occasions from December 2004 to April 2005.

The Board was well within its discretion to adopt the opinion of Dr. Grossinger that Lowman's work injury resolved within weeks of the incident. The Board noted that the weight of the evidence supported Dr. Grossinger's opinion. Specifically, the diagnostic testing, which was within normal limits; the lack of objective findings by any medical provider other than Dr. Smith; and the lack of any response or improvement from therapy or medication; supported Dr. Grossinger's opinion that Lowman did not have an organic condition underlying her subjective complaints. Lowman argues that the Board erred in accepting Dr. Grossinger's opinion, because his testimony was contradictory. Lowman observes that Dr. Grossinger testified that

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[40] *Jepsen v. University of Delaware-Newark*, 2003 Del. LEXIS 320, at *6 (Del. Super.)(*citing Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998)).

Lowman's injuries resolved within two weeks, but also stated that treatment rendered in November and December was reasonable and necessary. The Board was within its discretion to accept any portion of Dr. Grossinger's opinion. Accordingly, accepting Dr. Grossinger's opinion that Lowman's injuries resolved within weeks of the work accident was not an error.

The Board's decision, moreover, was not based solely on the opinion of Dr. Grossinger and the medical records. Substantial evidence existed to support the Board's finding that Lowman was not credible. The Board determined that Lowman's subjective complaints to the medical providers were inconsistent and often exaggerated. The Board detailed notations by the medical providers of their suspicions that Lowman was exaggerating or magnifying her symptoms. In addition, the Board noted that Lowman's actions while she was under the care of Dr. Smith were not consistent with her subjective complaints. Lowman complained to Dr. Smith of neck, shoulder, low back, hip, and leg pain, which increased when she returned to full-time work. However, despite these symptoms, Lowman did not undergo the prescribed diagnostic testing, and she missed or cancelled appointments with Dr. Smith. Additionally, the Board noted a gap of treatment for more than two months during which time, Lowman had exhausted her supply of prescription medication.

Finally, the Board did not err in denying Lowman's request for reimbursement of her mileage. The Board's decision did not detail why the mileage reimbursement request was denied, but noted that Lowman did not provide a breakdown of the mileage requested. A claimant is entitled to mileage reimbursement for travel to

obtain reasonable medical treatment.[41] Because the Board did not err in determining that the treatment rendered by Dr. Smith and Rehabilitation Associates was not causally related to the work accident, any expenses incurred by Lowman for travel to that office are also not compensable. Lowman's request to the Board was submitted as a lump sum of $47.12, which represented 152 miles at $0.31 per mile. Lowman had the burden of proving that the mileage was compensable. Here Lowman failed to specify the mileage, in order to demonstrate the dates and destinations of the mileage requested. Without any tangible means of ascertaining what the mileage represented, the Board was under no duty to estimate the compensable mileage from the date of the accident until the date of the MRI, the last treatment which the Board determined to be causally related to the accident.

## CONCLUSION

After reviewing the record, this Court is satisfied that the decision of the Industrial Accident Board, granting in part, and denying in part, Appellant's Petition to Determine Compensation Due, is supported by substantial evidence and free from legal error. Accordingly, the decision of the Board is AFFIRMED.

/s/ Robert B. Young
J.

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[41] § 2322 (g).